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IN THE

Supreme Court of the United States

October Term, 1969

No. 236

WILLIAM EVANS, Member of the BOARD OF SUPERVISORS OF ELECTIONS OF BALTIMORE CITY, *et al.*,

Appellants,

v.

TILLYE CORNMAN, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Maryland

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BRIEF OF THE APPELLEES

QUESTIONS PRESENTED

1. Is a tract of land which is located within the geographic boundaries of the State of Maryland, from whose residents the State of Maryland and/or one of its subdivisions collect income, sales, use, unemployment

insurance, gasoline and other motor vehicle fuel taxes and over which the State exercises certain other sovereign powers, to be deemed not part of said State for the purpose of the voting rights of its residents solely because the federal government exercises jurisdiction over the tract under the provisions of Article I, Section 8, Clause 17 of the Constitution of the United States?

2. Where certain apartment dwellers on a tract of land within the geographic boundaries of the State of Maryland pay to the State and its subdivisions the same taxes paid by all other apartment dwellers within the State, may be prosecuted under State criminal statutes, are subject to State unemployment and workmen's compensation laws, and have access to the State courts for divorce and adoption proceedings, does the State's action in depriving these apartment dwellers of their franchise solely because their landlord, the Federal Government, does not pay property taxes to the State and the State courts do not have jurisdiction over offenses committed by them at their place of residence, comport with the requirements of the equal protection clause?

STATEMENT

Approximately thirty-one years ago the Government of the United States established in Montgomery County, Maryland, a medical research center, known as the National Institutes of Health (hereinafter referred to as "NIH").[1] In order to enable the scientists there employed to stay close to their laboratories, the Government subsequently built residential facilities on the tract

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[1] The first buildings were completed in December 1938. U.S. Department of Health, Education and Welfare, Public Health Service, *NIH Almanac 1969* 111 (1969). The NIH tract was ceded to United States jurisdiction in 1953. Md. Code, Art. 96, §34.

it had reserved for the center and rented them to NIH employees and their families.[2] All twelve appellees live in these residential facilities. Ten of them have been registered voters of Montgomery County, Maryland for many years.

On October 19, 1968, the ten appellees who were registered voters were informed by the Permanent Board of Registry of Montgomery County that their names would be removed from the County voters' registry because as residents of an area under exclusive federal jurisdiction they did not qualify for voting in Maryland under the State Constitution. The other two appellees are persons who attempted to register to vote during 1968, but were not permitted to do so for the same reason.

The action of the Permanent Board of Registry was based upon the decision of the Court of Appeals of Maryland in *Royer v. Board of Election Supervisors*, 191 A.2d 446 (Md. 1963), *cert. den.* 375 U.S. 921 (1963). In that case, the court had held that a person residing on a so-called federal enclave located within Maryland was not a resident of the State within the meaning of Article I, Section 1 of the Maryland Constitution,[3] and that he was, therefore, not entitled to the franchise in the State.

Contending that the decision in the *Royer* case violated the equal protection clause of the Fourteenth Amendment to the United States Constituion, appellees sought a declaratory judgment and injunctive relief prohibiting the Montgomery County Board of Registry from

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[2] *Id.* 117-118.

[3] Article I, Section 1 of the Maryland Constitution grants the franchise to every citizen of the United States, twenty-one years of age or more "who has been a resident of the State for one year."

removing the names of the ten appellees already registered and to compel the registration of the two appellees seeking to vote for the first time. A three-judge court was convened pursuant to 28 U.S.C. §2281 to hear the case. On January 29, 1969, the court rendered an opinion which held that the interpretation placed on the word "resident" by the Maryland Court of Appeals in the *Royer* case was indeed violative of the equal protection clause. An order granting appellees the relief sought by them was signed by the court on February 19, 1969.

Defendants below, the Montgomery County Permanent Board of Registry, decided not to appeal the decision of the District Court. Because he felt it necessary to obtain review of that decision, the Attorney General of Maryland filed a motion to intervene in this case and caused the Board of Supervisors of Elections of Baltimore City to join him. The court below, with the consent of the defendants below, and with no objection interposed by appellees, granted the motion to intervene and this appeal followed.

ARGUMENT

I

DENIAL OF THE FRANCHISE DEPRIVES RESIDENTS OF THE TRACT OCCUPIED BY THE NATIONAL INSTITUTES OF HEALTH OF EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The basic principles that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment," *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665 (1966), that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the

State," *Carrington v. Rash*, 380 U.S. 89, 96 (1965), that "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest," *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) are by now so thoroughly ingrained in the law of the land that it is, at first blush, surprising that the issue which this case presents requires further consideration by this Court. On closer examination it develops, however, that during the early years of the Republic the concept evolved that areas within the exterior boundaries of a state which are under the "exclusive jurisdiction" of the United States should be considered separate and apart from the State and that the residents of such areas should not be considered residents of the State. See *Commonwealth v. Clary*, 8 Mass. 72 (1811).

The District Court noted that there has been a major change in the legal status of federal enclaves since the concept of enclave extraterritoriality was first evolved. Given the fact that the State of Maryland now exercises significant sovereign powers over the NIH tract, the tract in issue here, the court concluded that its residents must be treated as residents of the State for voting purposes.

Appellants have suggested that this decision infringes on the power of the United States to exercise "exclusive jurisdiction" over the tract. That contention, it is respectfully submitted, misses the point of the District Court's opinion. Appellees readily concede that the NIH tract is one over which the United States continues to exercise "exclusive jurisdiction" under the provisions of Article I, Section 8, Clause 17 of the Constitution of the United States. The issue posed by the decision below is not whether the United States still

possesses "exclusive jurisdiction" within the meaning of Clause 17, but what such "exclusive jurisdiction" means, how it is exercised and what consequences flow from the manner in which it is exercised.

The purpose of the framers of the United States Constitution in granting Congress the power "to exercise exclusive Legislation in all Cases whatsoever. . . . over all Places purchased by the Consent of the legislature of the State . . . . for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings" was to enable the Federal government to protect its facilities against unfriendly residents of the several states.[4] But the concerns which motivated the framers are no longer applicable to the relationship between the Federal Government and the states. In recent decades Congress has increasingly permitted state authority to be exercised on federal enclaves. The issue posed by this case is whether the entry of the state onto federal enclaves has not wrought a fundamental change in the legal rights of enclave residents.

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[4] In *Fort Leavenworth R. R. Co. v. Lowe*, 114 U.S. 525 (1885), this Court explained the origin of Clause 17 as follows:

> "The necessity of supreme legislative authority over the seat of government was forcibly impressed upon the members of the Constitutional Convention by occurrences which took place near the close of the Revolutionary War. At that time, while Congress was in session in Philadelphia, it was surrounded and insulted by a body of mutineers of the Continental Army. In giving an account of this proceeding, Mr. Rawle, in his treatise on the Constitution, says of the action of Congress: 'It applied to the executive authority of Pennsylvania for defense; but, under the ill-conceived Constitution of the State at that time, the executive power was vested in a council, consisting of thirteen members, and they possessed or exhibited so little energy, and such apparent intimidation, that the Con-

(Cont'd on p. 7)

A. The Legal Doctrine That Federal Enclave Residents Do Not Have The Right To Vote Stems From A Time When Federal Enclaves Were Indeed Totally Removed From State Jurisdiction.

In the early years of the Republic, the "exercise of exclusive legislation" meant that only the laws of Congress, and no other laws, were applicable on tracts under exclusive federal jurisdiction. The issue of whether residents of such tracts have the right to vote was first raised in 1840, when the Supreme Judicial Court of Massachusetts was called upon by the Massachusetts House of Representatives to determine (1) whether the residents of federal enclaves are entitled to the benefits of the public schools of their respective towns, (2) whether such residents are subject to local poll or state taxes, (3) whether they are legal inhabitants of their towns, and (4) whether they had the right to vote. *Opinion of the Justices*, 1 Met. 580 (1840).

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4 (Cont'd)

> gress indignantly removed to New Jersey, whose inhabitants welcomed it with promises of defending it . . . . The general dissatisfaction with the proceedings of the executive authority of Pennsylvania, and the degrading spectacle of a fugitive Congress, suggested the remedial provisions now under consideration.' Rawle, p. 113. . . . Upon the second part of the clause in question, giving power to 'exercise like authority' that is, of exclusive legislation 'over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings,' the Federalist observes that the necessity of this authority is not less evident. 'The public money expended on such places,' it adds, 'and the public property deposited in them, require that they should be exempt from the authority of the particular State.' "

In responding to these questions the Supreme Judicial Court pointed to the analogy between Federal enclaves and "the district ceded to the United States for the seat of Government." It went on to hold that

> "[W]here the general consent of the Commonwealth is given to the purchase of territory by the United States. . . . and where there is no other condition or reservation in the act granting such consent, but that of a concurrent jurisdiction of the State for the service of civil process, and criminal process against persons charged with crimes committed out of such territory – the government of the United States has the sole and exclusive jurisidiction over such territory, *for all purposes of legislation and jurisprudence, with the single exception expressed,* and consequently, that no persons are amenable to the laws of the Commonwealth for crimes and offences committed within said territory, and that persons residing within the same do not acquire the civil and political privileges, *nor do they become subject to the civil duties and obligations of inhabitants of the towns within which such territory is situated."* (Emphasis supplied.) 1 Met. at 583.

The court concluded that for the reasons stated the enclave residents were not entitled to the benefits of the local public schools, were not subject to state and local taxes, were not residents of the state for the purpose of qualifying for relief payments and were not entitled to vote.

And so the legal doctrine contended for by appellants was born. It was reinforced twenty-nine years later by the Supreme Court of Ohio in *Sinks v. Reese,* 19 Ohio St. 306 (1869).

Sinks v. Reese involved a disputed election in which a number of challenged votes were cast by residents of an institution known as "The National Asylum for Disabled Volunteer Soldiers." The Asylum was federal property and under exclusive federal jurisdiction. After discussing the nature of the institution, the Ohio Supreme Court asked the crucial question: "[W]hat is the legal status of persons who become residents upon the grounds, and within the limits, of the institution thus within the exclusive jurisdiction, and how does it affect their claim to exercise the elective franchise in Ohio, under its constitution and laws?"

To this question the court supplied the following answer:

> "By becoming a resident inmate of the asylum, a person, though up to that time he may have been a citizen and resident of Ohio, ceases to be such; *he is relieved from any obligation to contribute to their revenues, and is subject to none of the burdens which she imposes upon her citizens.* He becomes subject to the exclusive jurisdiction of another power, as foreign to Ohio as is [sic] the states of Indiana or Kentucky, or the District of Columbia. The constitution of Ohio requires that electors shall be residents of the state; but under the provisions of the constitution of the United States, and by the consent and act of cession of the legislature of this state, the grounds and buildings of this asylum have been detached and set off from the state of Ohio, and ceded to another government, and placed under its exclusive jurisdiction for an indefinite period. We are unanimously of the opinion that such is the law, and with it we have no quarrel; *for there is something in itself unreasonable that men should be permitted to par-*

ticipate in the government of a community, and in the imposition of charges upon it, in whose interests they have no stake, and from whose burdens and obligations they are exempt. (Emphasis supplied) 19 Ohio St. at 401.

The thread which runs through these leading cases, it will be noted, is the clear distinction between the enclave residents and the other residents of the state not only in terms of criminal jurisdiction but also in terms of their status as taxpayers. Enclave residents not only lived on tax-exempt land but were, beyond that, not subject to any form of state taxation, including taxes otherwise unrelated to the ownership of the land on which the taxpayer resides. Both courts emphasized that enclave residents were not subject to the "obligations" of other residents of the state and, therefore, should not share their privileges. The only relationship to the state which they shared was that they were subject to the service of civil process and of criminal process for offenses committed outside the confines of the enclave.

Thus, the Massachusetts and Ohio cases stand for the proposition that where the exclusive federal jurisdiction reserved by the Constitution is fully exercised, enclave residents do not have the right to vote. Nothing contained in the decision below is in conflict with that principle.

B. Federal Legislation Enacted In Recent Decades Has Changed The Status Of Federal Enclave Residents So Drastically As To Remove The Foundation On Which The Federal Enclave Doctrine Rested.

But the fact situation obtaining in 1840 and 1869 does not prevail any longer. What developments of recent decades have shown is that the Congress, while still possessing "exclusive jurisdiction" in the sense that it has the power at any time to oust all other sovereigns and

assert sole legislative authority, may admit another sovereignty, namely that of the State, to exercise governmental powers within a federal enclave for such time and to such extent as it permits. As the court below observed, "the concept of exclusive federal jurisdiction over reservations such as the one here involved has been drastically altered within the past 40 years." A. 22. Thus the power of exclusive jurisdiction, as granted by the Constitution, is indeed, as appellants put it," "unimpaired and unencumbered." Appellants' Br. 18. But Congress need not exercise that power to the fullest extent at all times and is not doing so now.

As the District Court points out, Congress enacted between 1928 and 1949 a series of laws which as long as they are in effect grant substantial powers to the states over the affairs of persons living on federal enclaves. A. 21. Thus a state's wrongful-death statute applies on federal enclaves located within the state's exterior boundaries. 16 U.S.C. §457. Workmen's compensation laws of the states now extend to federal enclaves. 40 U.S.C. §290. State gasoline and other motor vehicle fuel taxes must be paid on fuels sold in an enclave. 4 U.S.C. §104. State unemployment insurance laws are now in force on enclaves. 26 U.S.C. §3305(d). Since 1940 state sales, use and income taxes apply on federal enclaves to the same extent as they do at all other locations within the exterior boundaries of the state in question. 4 U.S.C. §§105-110. A lessee's interest in real estate within an enclave may also be taxed by the state. 10 U.S.C. §2667(e). While crimes committed on federal enclaves are prosecuted in the federal courts, it is the laws enacted by the state legislature which apply to most offenses through the Assimilative Crimes Act, 18 U.S.C. §13.

The concept of "exclusive federal jurisdiction" thus no longer means that only one sovereign, the Federal Government, governs on a federal enclave. It means,

instead, merely that the Federal Government has the power to govern to the exclusion of all other sovereigns, a power which it is not required to exercise to the fullest extent. Assuming, therefore, that *Opinion of the Justices* and *Sinks v. Reese* are an accurate statement of the law where exclusive federal jurisdiction is exercised completely, the question must be considered whether it is equally applicable in situations in which the Federal Government has permitted the state to enter and exercise broad governmental powers, particularly in the area of taxation.

While the court below was undoubtedly aware of the holding of this Court that the franchise cannot be conditioned on the payment of a tax, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), it did not think that the obverse was true, namely that the fact that they were subject to State taxation at their places of residence had no bearing on their right to vote. The court was aware of the fact that appellees are liable to pay the taxes and other charges which fund 50% of the education operating budget of Montgomery County and 88% of the operating budget for other County services. A. 24. It was undoubtedly also aware of the fact that the taxes for which appellees are liable also fund the operating budget of the State of Maryland.[5] Viewing the entire range of powers exercised by the State of Maryland over the NIH enclave and considering that "the elective franchise has always been considered one of the most basic of those rights, enjoyed by a citizen of a free democratic society," the District Court concluded that "the plaintiffs here are treated by the State of Maryland

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[5] The State's major sources of revenue from individual taxpayers are the retail sales tax, Md. Code, Art. 81, §§324 ff., the use tax, *Id.* §§372 ff., the income tax, *Id.* §§279 ff., and the motor vehicle fuel tax, *Id.* Art. 56 §§135 ff.

as state residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote . . . ." A. 25.

The essence of the District Court's holding is thus that the Federal Government's grant of authority to the State of Maryland over the NIH enclave and the State's exercise thereof has as its Constitutional consequence the acquisition of the franchise by enclave residents. *Opinion of the Justices* and *Sinks v. Reese* were bottomed on the proposition that enclave residents who have no obligations to the State in which the enclave is located have, by the same token, no rights against the State. Is the legal conclusion of these cases defensible where the facts on which they are premised no longer obtain? The concept of the total extraterritoriality of federal enclaves, the keystone of the Massachusetts and Ohio decisions, has in recent times been repudiated by this Court, which labeled it a "fiction". *Howard v. Commissioners of Louisville*, 344 U.S. 624, 627 (1953). In the context of the voting rights of enclave residents the applicability of the extraterritoriality doctrine to modern conditions was seriously questioned in *Arapajolu v. McMenamin*, 249 P.2d 318 (Calif. D. Ct. App. 1st D. 1952), see also *Adams v. Londeree*, 83 S.E. 2d 127 (W. Va. 1954) and *Rothfels v. Southworth*, 356 P.2d 612 (Utah 1960). The court below agreed with this line of recent cases and held that the obligations of enclave residents to the State were now so great and the exemptions from obligations so relatively insignificant as to require the grant of the franchise to such residents.

Appellants' response is to minimize the present obligations which the enclave residents have to the State and to allege that they are "relieved of many of the obligations of State citizenship." Appellants' Br. 20. The "escaped obligations" are identified as "freedom from real estate, severance, personal property, and other state

taxes. . . ; freedom from state regulatory and licensing legislation; freedom from service in the militia; freedom from compulsory education laws; and freedom from jury service." *Id.* 20-21.

The lower court has considered this contention and has rejected it:

> "It is no answer to say that there are many rights and obligations of citizens of Maryland which are not enjoyed by or have not been assumed by these plaintiffs. Without determining which way the scales would tip with respect to other rights, we are of the opinion that the incidents of jurisdiction exercised by Maryland over these plaintiffs are sufficiently weighty that the important right claimed here cannot be constitutionally denied." A. 25-26.

What the District Court viewed in balancing the scales was the real world in which the appellees and persons similarly situated live, not the abstraction conjured up by appellants. For the great majority of citizens of the State of Maryland the phrase "obligations of state citizenship" entails the payment of taxes to the State and its subdivisions, the registering of one's automobile with the State and the obtaining of a State driver's license. These obligations are borne by the appellees just as they are borne by other residents of Montgomery County and the State of Maryland.

More specifically, the taxes which appellants pay to the State and to Montgomery County, sales, use, income, and gasoline taxes, are the taxes paid by every other apartment dweller, or tenant of property owned by third parties in the County and the State. As already noted, the taxes for which appellees are liable, fund the operating budget of the State, 50% of the County school operating budget and 88% of the County's operating budget for other services.

It is conceded that appellees' landlord, the United States, does not pay real property taxes to the State or County, the taxes which fund the capital budgets of the State and County and portions of the County's operating budgets. It should be noted, however, that in lieu of taxes, the United States pays to Montgomery County so-called "impacted areas aid" for the education in the Maryland public schools of children of federal enclave employees. 20 U.S.C. §236 *et seq.* Moreover, clergymen and other residents of parsonages and persons living on the grounds of hospitals and other charitable institutions live on real estate exempt from real property taxation, Md. Code, Article 81, §9(4) and (7), yet do not forfeit their right to vote. Failure to pay the real property tax has been held by this Court to be insufficient ground for denial of the right to vote in a bond referendum. *Cipriano v. Houma,* 395 U.S. 701 (1969). How could it possibly justify denial of the right to vote for President of the United States?

The reasons for disregarding appellants' "freedom from real estate taxation" for purposes of this case are equally applicable to the other taxes referred to by appellants. Beyond that it should be noted that such taxes as the severance and personal property taxes, which are mentioned by appellants, are in the context of the residents of the NIH tract abstractions rather than an aspect of the real world for the simple reason that they would, at this time, affect neither them nor persons similarly situated.[6]

Similarly unreal are the other "freedoms" listed by appellants. There is doubt whether the "freedom from regulatory and licensing legislation" has any meaning for

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[6] Residents of Montgomery County pay no severance tax nor do they, as individual householders, pay a personal property tax.

appellees, who register their cars in Maryland and obtain drivers' licenses from the State.[7] The unorganized militia of the State, Md. Code, Art. 65, §5, has, as far as appellees have been able to determine, never been called out by the Governor of the State.[8] The "freedom" from the compulsory education laws, for which appellants cite no authority, is one of which appellees would most certainly not wish to avail themselves.[9] The argument that appellees are free from the requirement of jury service is circular as Maryland law now requires the selection of jurors from voter registration lists. Md. Code, Art. 51, §3.

The inescapable conclusion which must be drawn from the state of facts here obtaining is that appellees are in every meaningful way residents of Montgomery County and the State of Maryland. (See Stipulation, A. 14-15 for illustrations from their daily lives of their integration into the Montgomery County community.) To suggest that Old Georgetown Road or Wisconsin Avenue separate them from the State of Maryland is to resurrect the fiction which this Court interred in *Howard v. Commissioners of Louisville, supra.*

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[7] Appellee Celia W. Tabor obtained a Maryland license to practice medicine while residing on the NIH tract. A. 15. Appellants' assertion seems to refer to the holding of this Court in *Paul v. United States,* 371 U.S. 245 (1963), a decision which cannot conceivably have any bearing on the relations between appellees and the State of Maryland.

[8] It should be noted that six of the appellees are not part of the unorganized militia because they are female. Md. Code, Art. 65, §1. Five of the six male appellees may be exempt not because they are residents of a federal enclave but because they are employees of the Federal Government. *Ibid.*

[9] At least four of them have been members of Parent-Teachers Associations in Montgomery County. A. 14-15.

Nothing asserted here nor decided by the court below suggests that Maryland does not possess the power to establish residence requirements as a prerequisite to voting. As this Court observed in *Carrington v. Rash, supra*, "Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community." 380 U.S. at 93-94. "But," the Court continued, "if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation," *Id.* at 94.

Appellees, it is respectfully submitted, are bona fide residents of Maryland. They happen to live on land which is free of real property taxation.[10] Though they may not be prosecuted in the Maryland courts for crimes committed at their place of residence, they are subject to the criminal laws of Maryland. They have "a right to an equal opportunity for political representation." There is no "compelling state interest" to deny them the franchise.

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[10] Appellants suggest that if Congress retroceded jurisdiction over the NIH enclave, appellees would have the right to vote. Appellants' Br. 26. If that did occur, the real property on which they live would still be tax-exempt. It would thus appear that appellants' contention that appellees are to be deprived of their vote because of the tax status of the land on which they live is a mere make-weight and that the essence of appellants' argument is that the absence of State criminal jurisdiction over the NIH enclave is the sole ground for depriving appellees of the right to vote. In this context it should be noted that the states do not, with few exceptions, have criminal or civil jurisdiction over Indians on Indian reservations, see *Williams v. Lee*, 358 U.S. 217 (1959), *Seymour v. Superintendent*, 368 U.S. 351 (1962). Yet the right of Indians resident on such reservation to vote has been uniformly upheld, *Trujillo v. Garley* (D.N.M 1948) (unreported decision; three-judge court), *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948), *Montoya v. Bolack*, 372 P.2d 387 (N.M. 1962).

II

AS RESIDENTS OF THE NATIONAL INSTITUTES OF HEALTH TRACT ARE COUNTED AS MARYLAND RESIDENTS FOR CENSUS PURPOSES, DENIAL OF THEIR FRANCHISE VIOLATES SECTION 2 OF THE FOURTEENTH AMENDMENT.

In denying NIH residents the right to participate in Maryland elections, the State has not only violated the equal protection clause but its representation in Congress violates Section 2 of the Fourteenth Amendment. Section 2 requires that whenever the right to vote "is denied to any male inhabitants of such State, being twenty-one years of age, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

NIH residents are included in the decennial census which determines Maryland's representation in the House of Representatives. See A. 14. The constitutional issue raised by that fact was recently under judicial consideration in *Lampkin v. Connor*, 239 F. Supp. 757, 764 (D.D.C. 1965). In *Lampkin*, citizens of various states, some of which are allegedly under-apportioned and some of which were allegedly over-apportioned, sought to compel the United States Department of Commerce to comply with Section 2 in computing the apportionment of the House. The District Court dismissed the complaint for lack of standing. The Court of Appeals affirmed, but in so doing took note of specific legislation passed by Congress to alleviate the grounds of the complaint. The Court of Appeals pointedly concluded its opinion by informing the complainants that while "events have made their complaint unsuitable for judicial disposition at this time, we think it is also premature to conclude that

Section 2 of the Fourteenth Amendment does not mean what it appears to say." *Lampkin v. Connor*, 360 F.2d 505, 512 (D.C. Cir. 1966).

It is respectfully submitted that any doubt which may remain after consideration of the applicability of the equal protection clause to the claim for voting rights here asserted should be resolved in favor of a determination which provides for conformity of Maryland's representation in the House of Representatives with the requirements of Section 2 of the Fourteenth Amendment.

CONCLUSION

Appellants contend that affirmance of the decision below "would be inherently unfair to the states because it would permit persons to vote who are neither liable for many local taxes nor in many instances are subject to the authority of the very persons for whom they may vote." Appellants' Br. 27. What appellants seem to ignore is that under their theory appellees are completely deprived of any opportunity of voting for President and Vice President, for the United States Senate and the United States House of Representatives, thus for officials who have as much authority over them as they have over any other resident of the State of Maryland. They would also be deprived of the opportunity of voting for the Governor of the State in whose midst they live and to whose authority they are closely tied. They would be deprived of the opportunity of voting for the state legislators who levy all the taxes paid by them and frame the civil and criminal laws applicable to them, for the board of education which operates the schools their children attend. Of the more than fifty public and party officials which appellees would have the right to elect, only one, the State's Attorney for Montgomery County, can be said to have no authority whatever over their place of residence.

Considering the broad sweep of the State's exclusion of appellees from the franchise and the thin reed on which it leans, appellants' justification not only fails to measure up to the standards set by the majority of the Court in cases such as *Harper v. Virginia Board of Elections, supra,* and *Kramer v. Union Free School District, No. 15, supra,* but also does not meet the requirements of the minority, as stated in the dissent of Mr. Justice Harlan in the *Harper* case:

> "The Equal Protection Clause prevents States from arbitrarily treating people differently under their laws. Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected; the clause has never been thought to require equal treatment of all persons despite differing circumstances. The test evolved by this Court for determining whether an asserted justifying classification exists is whether such a classification can be deemed to be founded on some rational and otherwise constitutionally permissible state policy." 383 U.S. at 681.

The fact that if one of appellees were to commit a crime at his place of residence he would be subject to arrest by the Federal Bureau of Investigation rather than the Montgomery County police and subject to prosecution by the United States Attorney in the federal courts rather than by the State's Attorney in the state courts cannot be the basis of a "rational and otherwise constitutionally permissible state policy" depriving him completely of his right to vote.

That this deprivation of the vote would be absolute and complete deserves special emphasis. In *Carrington v. Rash, supra,* it will be recalled, the Court considered a provision of the Texas Constitution which merely had

the effect of preventing "a person entering military service as a resident citizen of another state from acquiring a voting residence in Texas during the period of military service." *Carrington v. Rash*, 378 S.W.2d 304, 305 (Tex. 1964). Presumably such military personnel could still vote at their place of residence at the time they entered the armed forces. This Court's decision accorded them the privilege of giving up their previous voting residence and voting in Texas. Appellees in the instant case would not have similar options. Appellants are not disputing that appellees have established a residence on North Drive and Center Drive in Bethesda, but argue that North Drive and Center Drive are not part of Maryland but are part of "[t]he fiction of a state within a state." *Howard v. Commissioners of Louisville*, 344 U.S. at 627. If appellees cannot vote in Maryland, they cannot vote anywhere.

It is indeed true, as appellants point out, that efforts have been made in the past to resolve the injustice at issue here through legislative action and through amendment of the Maryland Constitution. It is also true that these efforts have failed. No citation of authority is necessary for the fundamental proposition that a citizen need not wait for legislative action to vindicate a right given him by the Constitution of the United States.

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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